No. 14,610

In the

United States Court of Appeals

For the Ninth Circuit

BERNARD G. JESONIS,

Appellant,

vs.

OLIVER J. OLSON AND CO.,

Appellee.

Brief for Appellee

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STATUTES

TEXTS

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I.

PREFACE

Appellant has posed four questions which he alleges are involved in this appeal. They are as follows:

1. Did the trial Court err in giving to the jury instructions requested by appellee, and in refusing other instructions requested by appellant?

2. Did the trial Court err on the question of jurisdiction in taking away from the jury the maritime issue of unseaworthiness?

3. Was the jury's verdict so contrary to the weight of the evidence that a miscarriage of justice was done?

4. If the Court below properly had jurisdiction to determine the maritime issue of unseaworthiness, apart from the jury, was the Court's determination of this cause of action in appellee's favor contrary to the great weight of the evidence?

The last two questions posed by appellant are necessarily dependent upon what the evidence actually was at the trial, and the answer to the first question is also somewhat dependent upon the facts of the case. Consequently it is deemed appropriate to discuss first the evidence upon which the jury determined that there was no liability of the steamship owner in this case.

II.

STATEMENT OF THE CASE

The appellant, Bernard G. Jesonis, a merchant seaman, was injured aboard the steam schooner MARY OLSON at Longview, Washington, on June 24, 1953. The vessel was at the dock, and lumber was being loaded into No. 4 hold.

When appellant was returning to his job in No. 4 hold after a "coffee break" he started to descend the ladder leading into No. 4 hold. In so doing he swung one leg over the hatch coaming and placed his foot upon a ladder rung variously estimated to be the second or third rung. This position required him to swing his other leg over the hatch coaming in a manner described by one witness as being at least waist high (R., p. 83, lines 16-23). After his leg was swung over the coaming, for some reason admittedly unknown to the appellant, he fell from the ladder.

The Evidence

The appellant was wearing gloves which were greasy when he started to descend the ladder (R., pp. 44-48). Expert seamen testified that it is not good seamanship to wear gloves when descending a steel ladder (R., p. 252, lines 19-26; p. 253, lines 1-3; p. 336, lines 8-17). The appellant claimed that there was oil on his shoes which he had picked up from walking on the deck. There was substantial evidence that the decks were not oily in any of the passageways where appellant had been (R., p. 246, lines 1-17). The evidence was uncontradicted that the shoes the appellant had on at the time had been carefully preserved in a seabag after the accident (R., p. 78, lines 14-17; p. 79, lines 14-21; p. 80, lines 9-12), and in fact prior to the trial had been given to appellant's attorney "for evidence" (R., p. 369, lines 6-12). The shoes were never introduced by the appellant in his case, and in fact were kept entirely away from the trial until mentioned by counsel for appellee.

The evidence was that there were some slight bends in the ladder rungs, and yet it was never claimed by the appellant himself that these bends in any way caused his fall.

On this evidence the jury found that there was no negligence on the part of the appellee that proximately caused the appellant to fall.

The case is a simple negligence case, since the jury never reached the question of contributory negligence or damages, having found first that there was no negligence on the part of the appellee which proximately caused the injury. There were conflicts in the evidence with regard to the oil on the deck, and possibly on the hatch coaming and ladder rungs, but there was convincing evidence that the deck space (R., p. 325, lines 13-22), hatch coaming (R., p. 251, lines 16-20; R., p. 333, lines 21-24), and ladder rungs (R., p. 253, lines 11-13; R., p. 333, lines 17-20) were free from any grease

or oil. The sailors testified that the hull rope that runs to the crane was slushed with oil and the oil got on the hatch coaming. This was emphatically denied by the mate, Mr. Johnson (R., p. 279, lines 11-14).

The bend in the ladder rungs was such that an expert seaman testified: "When they are bent that little, that doesn't do any harm to go up and down it." (R., p. 287, lines 1-2). See also R., 352, lines 10-11, where the first mate testified the rungs were bent only a little bit. The jury was shown pictures of the ladder (Pl. Ex. 1, 2 and 3) and presumably concluded, as did the Court, that the slight bend (if such can be called a bend) in the rungs did not constitute an unsafe condition.

The ladder was the customary type used on ocean going vessels (R., p. 254, lines 3-13) and there was no evidence to the contrary to show unseaworthiness.

The jury apparently chose to believe the evidence presented by the appellee, and on that basis found no negligence on the part of the appellee. The Court apparently believed the evidence presented by the appellee with regard to the seaworthiness of the ladder, and consequently found the vessel to be seaworthy.

These were solely questions of fact, determined by the jury and the Court on conflicting evidence, in favor of the appellee. No citation of authority is necessary to support the statement that this Court will not substitute its judgment on such questions for that of the jury or the trial judge.

The very brief summary of the evidence given above covers all of the points in this connection raised by appellant in his opening brief. However, during the trial the appellant also contended that improper lighting contributed to his accident, and also that the Texacote applied to the decks of the vessel was picked up on his shoes and con-

tributed to his fall. Suffice it to say that the officers of the vessel described the lighting at great length and contradicted the evidence presented by the plaintiff with regard thereto (R., p. 237, lines 6-25; pp. 238, 239, and 240, lines 1-13). With regard to the Texacote there was ample evidence that it was dry on the night of the accident—not only by the testimony of the mates (R., p. 329, lines 14-25; pp. 330 and 331), but also by the testimony of the manufacturer's representative (R., pp. 358, 359, 360).

Mr. Resner, counsel for appellant, has quoted in his brief a portion of the testimony which is an obvious mis-transcription by the reporter. On page 33 of appellant's brief, he quoted the direct examination of Mr. Johnson as follows:

> "Q. Did any of them complain to you about any alleged oil in that space between the hatch coaming and the ladder?
>
> A. *Yes.*"

The preceding question and the following question make it obvious that the answer was "No". The following question was:

> "Q. Did any of them complain to you whatsoever about the condition of the vessel at that time?
>
> A. Not at that time." (R. 256, lines 7-9)

In addition it was clearly shown by the previous testimony of the witness that there was no oil in the area between the hatch coaming and the ladder (R. 246, lines 5-17). Mr. Andres, the chief mate, testified that the Union delegate made no complaint with regard to the working conditions around No. 4 hatch (R., p. 338, lines 20-26). All of this goes to show that counsel for appellant, in his diligent search to find one small piece of evidence upon which to base his claim of error, has found only an error in the transcription of one word.

It is respectfully submitted that the evidence fully supports the verdict of the jury finding no negligence on the part of appellee which proximately contributed to the accident, and further fully supports the judgment of the trial Court on the unseaworthiness cause, wherein he found no unseaworthiness and rendered judgment in favor of the appellee (R., p. 401, lines 16-17).

Consequently the answers to Questions 3 and 4 posed by the appellant should be in the negative.

The Instructions

A. ASSUMPTION OF RISK

The appellant contends that the Court gave an instruction on the doctrine of "assumption of risk". This is not the case at all. The doctrine of "assumption of risk" involves assuming a risk caused by the negligent conduct of the defendant. It involves the "assumption of risk of negligent conduct". *Witkin—Summary of California Law*, Sixth Edition, page 788. Restatement of Torts, Section 466.

The Court, of course, gave no such instruction. The Court specifically declared that "the plaintiff as an employee, *in the absence of negligence on the part of his employer*, assumed the *ordinary risk* of his employment as a seaman".

The Court went on to explain that every human activity has dangers, and when a man goes to sea he exposes himself to certain dangers as does everyone who undertakes any physical task whatsoever. The Court emphasized that it is only the *ordinary* risk which creates no liability, and that risks created by a negligent act do create liability.

For this court's convenience the entire instruction to which appellant objects is reprinted here.

> "You are instructed that the plaintiff, as an employee, *in the absence of negligence on the part of his employer* assumed the *ordinary risks* of his employ-

ment as a seaman. There is some danger of injury in every employment as there is in almost every human activity. In some employments there are more dangers normally incident to the exercise of that employment than in others. The work of a seaman on a vessel cannot be measured in the terms of employment on shore, but must be considered in the light of dangers normally incident to that employment. An employer is not liable simply because there is or may be danger normally incident to an employment. An employer is liable under the Jones Act only when he is negligent. Negligence is a relative term and must be measured according to the circumstances of the employment and the facts of each particular case."

The language of this instruction is no more than a paraphrase of the language of the Supreme Court Decision in *The Iroquois,* 194 U.S. 240. In that case, at page 243 the court states: "A seafaring life is a dangerous one, accidents of this kind are peculiarly liable to occur, and the general principle of law that a person entering a dangerous employment is regarded as assuming the ordinary risk of such employment is peculiarly applicable to the case of seamen." Although this case was decided prior to the enactment of the Jones Act, it has been held to the law after the Jones Act. *The Arizona v. Anelich,* 298 U.S. 110, 80 L.ed. 1075 at page 1081.

The appellant argues in circles in his brief at page 9. He agrees first, that seamen assume the risk "normally incident" to his calling, and then ignores the verdict of the jury when he states that an "unsafe" ladder is not an incident normal to his calling. The jury found, and the court found, that the ladder was not "unsafe". How can it be said that the climbing or descending of a ladder is not an "incident normal to a sailor's calling"?

For the instruction to have been erroneous there would necessarily have to have been an admission on the part of

the appellee that there was negligence, or that the ladder was unsafe. The question of negligence was still before the jury when the instruction was given, and it is presumed that it was decided that no negligence existed and the ladder was safe. The court specifically qualified the instruction with the words "in the absence of negligence" and "ordinary risk".

Appellant's contention that from this instruction the jury could have believed that "a greasy oil covered, bent ladder was an "ordinary risk" (Pl. Brief 9) is not only far-fetched but was specifically negated in the Court's giving of appellant's proposed instruction No. 6* (Cl. Tr. 29; R. 382) wherein the Court instructed the jury that if plaintiff proved "one or more of these contentions, * * * and if any "were the proximate cause of plaintiff's injuries then a verdict should be found for the plaintiff."

It is submitted that the instruction was clearly a correct statement of the law. To accept appellant's argument that a seaman assumes no risk in going to sea is to say that a vessel is as safe as the grave, or that the employer is an insurer of the seaman's safety. Obviously neither is the fact nor the law.

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*Plaintiff contends that defendant was negligent in various ways as follows:

1. That the ladder and deck where plaintiff was working at the time of his accident were covered with oil and grease, known to defendant, and defendant failed to take any action to clean up or remove the oil and grease.

2. That the ladder which plaintiff was descending had bent and defective rungs, no side supports, and failed to provide safe footing for plaintiff as he descended into the number 4 hold.

3. That the area was improperly and insufficiently lighted and plaintiff could not clearly see as he descended into the hold.

If you find that plaintiff has proved one or more of these contentions by a preponderance of the evidence, and that such acts or omissions on the part of defendant, if proved, constitute negligence, and were the proximate cause of plaintiff's injuries, then a verdict should be found for plaintiff.

The appellant has cited *Armit v. Loveland* (C.C.A. 3), 115 Fed. 2d 308 in support of his contentions. In that case there was admittedly oil splashed all over the floor of the engine room. The court merely held that the seaman did not assume the risk of this admittedly unsafe condition. In our case no unsafe condition was admitted, and in fact the evidence was very strong to show that none such existed. This case merely points out the correctness of the qualifying phrase used in the instruction "in the absence of negligence."

Appellant has also cited *Socony Vacuum Oil Co. v. Smith*, 305 U.S. 424, 59 S.Ct. 262, 83 L.ed. 265. In that case there was, once again, admittedly defective appliances which proximately caused the seaman's injury. The court held that there is no defense of assumption of risk where a seaman knowingly used an admittedly unsafe appliance. This is not pertinent to our case since there was conflicting evidence on whether or not the appliance used was unsafe.

The appellant has cited six cases in a list on page 10 of his brief, allegedly standing for the proposition that "There is no assumption of risk in cases like ours."*

**The Diamond Cement* (C.C.A. 9), 95 Fed. 2d 738. Court found a loose pipe lying on engine room floor was unseaworthy.

Menefee v. W. R. Chamberlin & Co. (C.C.A. 9), 176 Fed. 2d 828. Court found vessel unseaworthy because a hawser had not been stowed properly prior to sailing. Sailor injured while stowing.

Storgard v. France & Canada S. S. Corp. (C.C.A. 2), 263 Fed. 545. Vessel was unseaworthy because of a worn bolt which broke while being used by a seaman.

Phillips v. Matson Nav. Co. (D.C. Cal.), 62 F. Supp. 247. Seaman slipped in a pool of oil which had admittedly accumulated at the bottom of a ladder. Judge Goodman found negligence on the facts.

Beadle v. Spencer, 298 U.S. 124, 56 S. Ct. 712, 80 L.ed. 1082. A seaman was injured by falling off a pile of lumber which was determined to have been negligently stowed.

The Arizona v. Anelich, 298 U.S. 110. 56 S.Ct. 707, 80 L.Ed. 1075. Court reiterated that seamen assume ordinary risk, and approved *The Iroquois* (supra) and held that seamen do not assume risk of unseaworthiness.

In each of these six cases there was found to be an unseaworthy condition, or it was found that the accident resulted from negligence of the shipowner. These cases by their holdings emphasize that the seamen do assume the ordinary risk of their profession, but do not assume the risk of working with a defective appliance, nor do they assume the risk of negligence on the part of their employer. We have no argument with this holding. However, it is to be reiterated here, that the court in our case did not instruct the jury that the appellant assumed the risk of negligence, or unseaworthiness—the court instructed the jury only that *in the absence of negligence,* the appellant assumes the *ordinary risk* of his profession.

The appellant has also cited *Tiller v. Atlantic Coast Line R. Co.,* 318 U.S. 54, pp. 64, 66, 63 S.Ct. 444, 87 L.Ed. 610. This is a case involving injury to a railroad employee. A careful reading of the case re-emphasizes that the legal doctrine commonly termed "assumption of risk", means the assumption of the risk of negligence, or risk arising from use of a defective appliance, and this defense is admittedly abolished by the Jones Act.

It is suggested that plaintiff has confused the legal doctrine often described as "assumption of risk" with a completely different principle, merely because three of the same words appear in the context of each. That a seaman assumes the risk of negligence is no longer a defense. That a seaman assumes the *ordinary risk of his profession* is merely a declaration of a sound legal principle. The fact is that appellant's counsel consented to the giving of this first sentence of the instruction, stating that he deemed it to be a "sufficient instruction" (R. 300, lines 7-8). The first sentence reads "You are instructed that the plaintiff, as

an employee in the absence of negligence on the part of his employer, assumed the ordinary risk of his employment as a seaman."

B. UNAVOIDABLE ACCIDENT

The appellant has contended that the court prejudiced the appellant's case by giving an instruction on unavoidable accident. Such is not the case. The court gave an instruction on this because it is customary to do so in negligence cases. The reason is obvious. It is to point out to the jury that "even if such an accident could have been avoided by the exercise of exceptional foresight, skill or caution", if it was not "proximately caused by negligence", then no one may be held liable therefor. Obviously the jury could reach the conclusion that there was no negligence on the part of appellee that proximately caused the accident, but one or two jurors might still say "we agree—but it *did* happen". The purpose of the instruction is to avoid the possibility that the jury might reach an erroneous verdict, merely because of the happening of an accident, after having found no negligence which was the proximate cause. It is submitted that the instruction was entirely proper, and in no way prejudicial to the appellant's case.

C. ALLEGED FORMULA INSTRUCTIONS

The appellant has argued that the court unduly emphasized "defense" instructions. He argues that instruction Nos. 7, 8, 11, 15 and 16 are repetitious. Such is not the case.

Instruction No. 7 (Cl. Tr. 46) instructs the jury that under the Jones Act, the plaintiff must prove negligence by the *preponderance of the evidence.*

Instruction No. 8 (Cl. Tr. p. 46) instructs the jury that there is *no presumption* of negligence because of the happening of an accident.

Instruction No. 11 (Cl. Tr. 48) defines negligence as the "doing of some act which a reasonably prudent person would not do, or the failure to do something a reasonably prudent person would do," and further defines "reasonably prudent person" by pointing out that "exceptional foresight" is not required. It concludes by stating that if the weight of the evidence is equal, then the verdict must be for the appellee. This is a necessary instruction to adequately define what is meant by "preponderance of the evidence".

Instruction No. 15 (Cl. Tr. 50) instructs the jury that the existence of a defective condition does not in itself establish negligence, but that it must also be shown that the condition was the *proximate cause* of the injury.

Instruction No. 16 (Cl. Tr. 51) instructs the jury that all of the above must be found because the *steamship company is not an insurer.* It defines the duty to exercise reasonable care.

Each of these instructions covers a separate and distinct element of actionable negligence, and each is necessary for the jury to obtain an adequate understanding of the problem put before them.

The two cases cited by appellant, allegedly supporting the proposition that these instructions were objectionable on the ground of repetition (Appellant's Brief, p. 15, *Chutuk v. Southern Counties Gas Co.*, 21 Cal. 2d 372 and *Snodgrass v. United States* (C.C.A. 9), 61 F.2d 99) merely held that refusal to give instructions already adequately covered by others was not error.

Appellant also argues that there were two instructions given on contributory negligence (Appellant's Brief, pp. 17 and 18). These instructions primarily advise the jury with reference to the rule of apportionment of damages. They could not have been prejudicial since the jury is presumed not to have reached the question, having found no negligence on the part of the appellees.

Appellant addresses a specific objection to Instruction No. 8, which reads as follows (Cl. Tr., p. 46):

> "No presumption of negligence is created by reason of mere happening of an accident. Unless you can determine from a preponderance of the evidence the manner in which the accident occurred and that it was proximately caused by negligence on the part of the defendant, it is your duty to find for the defendant on the issue of negligence."

No objection was made to this instruction at the time the instructions were discussed in Chambers (R. pp. 297-298). Consequently, the nature of the objection was never called to the attention of the court. The argument now presented is entirely without merit. Appellant objects because the court used the phrase "Unless you can determine from the preponderance of the evidence the manner in which the accident occurred and that it was proximately caused by the negligence on the part of the defendant * * *"—and asserts that there is no requirement that the jury determine "the manner in which the accident occurred."

We submit that in all cases it is necessary for the jury to be able to find the manner in which the accident occurred. *Franklin v. Skelly Oil Co.*, 141 Fed. 2d 568, 571 (10 Circ.); *Snow v. Harris*, 41 Cal. App. 34, but in this case the argument is entirely irrelevant. The manner in

which the accident occurred was admitted by all witnesses. The plaintiff fell off the ladder in No. 4 hold of the SS MARY OLSON. If the Appellant had been found at the bottom of the ladder, unconscious and without recollection of how he got there, then the jury would have to determine, either by reasonable inferences, or by direct evidence that he fell from the ladder, before reaching the question of negligence. In this case numerous witnesses saw the fall, so there was no question as to the manner in which the accident occurred, the question for the jury was the cause.

Obviously the jury determined the manner in which the accident occurred, because it was admitted, and the instruction merely stated that they must find that this fall was proximately caused by the negligence of the appellee before finding appellee liable. Admittedly the wording may have been surplusage, but it was merely introductory to the remainder of the instruction, and since there was no question as to the manner in which the accident occurred the instruction could not possibly have prejudiced the appellant.

The Court properly instructed the jury that if the fall was caused by either the bent ladder rungs, or by appellant's slipping on oil or grease, or by both, then a verdict must be for plaintiff (Cl. Tr. 29; R. 382) so the instruction stating that the jury must find the "manner" of the accident was fully explained and appellant's objection thereto was entirely negated.

Appellant further objects to Instruction 8 on the ground that it was a "formula instruction" which did not state all of the elements essential to the case of the party in whose behalf it was given.

For an instruction to be properly termed a formula instruction it must be one that is "intended to be a complete statement of the law upon which the jury may base a verdict". *Harvey v. Aceves,* 115 Cal. App. 333 at page 339; *Douglas v. Southern Pac. Co.,* 203 Cal. 390. It is obvious that this instruction was an instruction only upon one branch of the case and did not purport to be a complete statement of the law. It is therefore not a "formula instruction", nor would it be logical to assume that it was intended as such or accepted as such by the jury. *Harvey v. Aceves,* supra.

Appellant argues that Instruction No. 11 (Cl. Tr. 48) was also a formula instruction. The statement and cases cited in the paragraph immediately preceding are equally applicable in rejecting this contention.

D. INSTRUCTIONS NOT GIVEN

Appellant argues that the court erred in failing to give his requested instruction No. 3 (Appellant's Brief, p. 19). This instruction was given in its entirety (Cl. Tr. p. 48, R. 378). Appellant also argues that the court should have given his proposed Instruction No. 10 on contributory negligence. The context of that instruction was given twice, in slightly different words (Cl. Tr. 54-56, R. 363, 364).

In conclusion, the appellant urges that the court's charge, taken in its entirety, unduly emphasized the defense side of the case. The entire charge appears in the record commencing at page 373 and ending at page 391. It is respectfully suggested that a complete reading of the charge as a whole will give no such impression, and in fact if any emphasis is to be gained other than that of complete impartiality, the tendency appears to be in favor

of the appellant. Practically all of the appellant's proposed instructions with regard to damages were given, and ample instruction on the fact that contributory negligence, if proven, only serves to mitigate the damages, all of which could well be said to indicate a verdict in favor of the appellant.

The appellant states that because the Trial Judge stated after the verdict that he believed the jury had reached a "proper verdict" is evidence that the judge was prejudiced in favor of the appellee. This comment was made in conjunction with the court's compliments to the jury on the time and care they had used in reaching the verdict and was nothing more than an indication that the judge believed that the jury had thoroughly and properly considered the evidence (R. 401).

JURISDICTION OF THE MARITIME ISSUE OF "UNSEAWORTHINESS"

Appellant argues that the court erred in ruling that absent diversity of citizenship the Maritime causes of action for maintenance and unseaworthiness were exclusively within the admiralty jurisdiction of the court.

It should be sufficient to say that the appellant relies entirely upon the case of *Doucette v. Vincent,* 194 Fed. 2d 834, and that that case is simply not the law in this circuit. This court has already passed on the question in *Modine v. Matson,* 128 F. 2d 194 (C.A. 9, 1942). The most frequently cited case, and the case relied upon by the District Court is *Jordine v. Walling,* 185 F. 2d 662 (C.A. 3, 1952). In that case the rationale of the unsolicited opinion of Judge Magruder in *Doucette v. Vincent,* supra, was disapproved.

The District Courts of the United States have jurisdic-

tion of civil actions under the terms of Section 1331 and 1332 of Title 28, United States Code. Appellant in the case below alleged a cause of action for damages for personal injuries due to the alleged negligence of the defendant. That cause of action, which was the first, arose under the Jones Act and was within the civil jurisdiction. The second and third causes of action alleged in the complaint arose under the general maritime law. They are civil actions falling within Section 1332. Inasmuch as they do not arise under the constitution, laws or treaties of the United States, diversity of citizenship is a pre-requisite to the jurisdiction of the court. It was alleged and admitted by the pleadings that there was no diversity of citizenship (Cl. Tr. 2, and Cl. Tr. 10).

The jurisdiction of federal courts in cases involving claims of unseaworthiness is exactly the same as the jurisdiction over seamen's claims for maintenance. The overwhelming weight of authority is that those cases which fall in the admiralty jurisdiction of the court may be prosecuted on the law side only where there is diversity of citizenship, unless the action is maintained under a special statute such as the Jones Act. The question has been settled in this circuit by the decision of *Modine v. Matson Nav. Company,* 128 F. 2d 194 at page 196 wherein this Honorable Court stated:

> "We conclude that Count 2 (maritime cause for maintenance) did not state a claim upon which the District Court, sitting as a law court, could grant relief. If the District Court could grant relief upon the claim * * * it could do so only in admiralty."

The most authoritative text on the practice of Admiralty thoroughly agrees with *Modine v. Matson* (supra) and *Jor-*

dine v. Walling (supra). *Benedict on Admiralty,* 6th Ed., Vol. 4, page 200. In the supplement to Vol. 4, page 40, the author states:

> "The common law side of the Federal District Court can not entertain a suit for maintenance and cure (citing *McDonald v. Cape Cod Trawling Corp.,* 1947 AMC 699, 71 F. Supp. 888 (D.C. Mass.) and others), or for indemnity for injuries under the general maritime law unless the jurisdictional minimum amount of $3,000 can be shown, and unless diversity of citizenship exists. (Citing *Branic v. Wheeling Steel Corporation,* 1946 AMC 66, 152 F. (2d) 887 (C.A. 3d) certiorari denied (1946) 327 U.S. 801, 90 L. ed. 1026 and others)."

The same rule is applied in the 7th Circuit. *Mullen v. Fitz Simons and Connel Dredge and Dock Co.,* 191 F. 2nd 82 (C.A. 7, 1952), cert. denied 342 U.S. 888 and 344 U.S. 933.

Failure to meet the jurisdictional requirements has been the basis of rulings in several district courts. *McDonald v. Cape Cod Trawling Corporation,* 71 F. Supp. 888 (D.C. Mass. 1947). (Judge Wyzanski confessed in this case that district courts have frequently, but erroneously, allowed such cases to be tried on the law side.) *Catherall v. Cunard SS Co.,* 101 F. Supp. 230 (D.C., S.D.N.Y., 1951); *Watlack v. North Atlantic & Gulf SS Co.,* 107 F. Supp. 162 (D.C. Penn. 1952).

The same ruling was applied in a case involving a longshoreman's action for negligence. *Ferris v. American South African Line, Inc.,* 1945 AMC 1296 (D.C. S.D.N.Y., 1945).

The ruling is otherwise in the First Circuit Court of Appeals. In *Doucette v. Vincent,* 194 F. 2nd 834 (1952),

that court disagreed with the cases upon which we rely, but the First Circuit stands alone on the question.

Appellant has argued that the Supreme Court passed on this question, and infers a decision favorable to his contentions from the result of *Pope & Talbot v. Hawn,* 346 U.S. 406, 74 S. Ct. 202, 98 L. ed. 143. This same argument was made to the District Court for the Eastern District of New York in *Paduano v. Yamashita Nisen Kabushiki Kaisha,* 120 F. Supp. 304 (decided March 31, 1954) and was rejected in a thorough and excellently reasoned opinion. In so doing the court drew attention to the footnote to the decision in *Pope & Talbot v. Hawn,* (supra) appearing at page 410 of the report in 346 U. S. Counsel for appellant has ignored the footnote in arguing that this case inferentially passes on the question and consequently the footnote is set out in full as follows:

> "The complaint shows diversity which is sufficient to support jurisdiction of the District Court. The complaint also shows that the claim rests on a maritime tort which under the Constitution is subject to dominant control of the Federal Government. In this situation we need not decide whether the District Court's jurisdiction can be rested on 28 U.S.C. § 1331 as arising 'under the Constitution, laws or treaties of the United States.' See *Doucette v. Vincent,* 194 F. 2d 834, and *Jansson v. Swedish American Line,* 185 F. 2d 212. Cf. *Jordine v. Walling,* 185 F. 2d 662."

Appellant's argument that the "impact of the decision would seem to leave it clear that jurisdiction can be founded on that provision (28 U.S.C. 1331)" (App. Brief p. 27) is thoroughly considered in the *Paduano* case supra, and is not accepted (see 120 F. Supp. at page 313.)

It is respectfully submitted that the great weight of authority supports the earlier decision of the court in *Modine v. Matson Nav. Co.* (supra) and there exists no reason to change the law as it now stands in this circuit. District Judge Westover correctly followed the law in this circuit and no error was committed in reserving the jurisdiction of the seaworthiness cause to the court, sitting in Admiralty.

Counsel for appellant complains that the District Court "quickly and without argument from counsel, followed the jury's verdict" (App. Brief, p. 29). We feel obliged to call to this court's attention that counsel for appellant had submitted the question to the court without further argument, prior to the jury's verdict. At page 394 and 395 of the record, the following dialogue occurred:

> "The Court: At the beginning of this trial I reserved any evidence you wished to introduce on the second and third causes of action.
>
> Mr. Resner: On the third cause of action, I have no evidence because I concede we have no cause of action.
>
> On the unseaworthiness count, I submit the case to the court on the record as made in court.
>
> Mr. Harrison: So submitted, your Honor.
>
> The Court: Then the only thing now is to wait patiently for the jury.
>
> Mr. Resner: I assume so, your Honor."

So it can be seen that evidence or argument on the point was invited by the court and counsel for appellant chose to submit the matter at that time. He should not now be heard to complain that he was not allowed to argue the point after the jury returned a verdict unfavorable to him.

CONCLUSION

It is respectfully submitted that the case presented nothing more than a question of fact for the jury to decide under the Jones Act, and a question of fact for the court to decide under the general maritime law. The verdict and judgment were amply supported by the evidence.

There was no error in the instructions nor was there error in reserving the maritime cause to the court sitting in Admiralty.

The judgment should be affirmed.

Dated: June 30th, 1955.

Respectfully submitted,

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Counsel for Appellee